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DEPARTMENT OF STATE

22 CFR Parts 123 and 126

RIN 1400-AC71

[Public Notice: 7865]

Amendment to the International Traffic in Arms Regulations:

Exemption for Temporary Export of Chemical Agent Protective Gear

AGENCY: Department of State.

ACTION: Final Rule.

SUMMARY: The Department of State is amending the International Traffic in Arms Regulations (ITAR) to add an exemption for the temporary export of chemical agent protective gear for personal use. The exemption for body armor is amended to also cover helmets when they are included with the body armor. An exemption for firearms and ammunition is clarified by removing certain extraneous language that does not change the meaning of the exemption, and by standardizing the language among the exemptions in this section of the regulations. The registration requirement as it relates to certain exemptions is clarified. And an error in the authorities for part 126 of the ITAR is corrected.

EFFECTIVE DATE: This rule is effective [insert date 30 days after date of publication in the *Federal Register*].

FOR FURTHER INFORMATION CONTACT: Ms. Candace M. J. Goforth, Acting Director, Office of Defense Trade Controls Policy, Department of State, telephone (202) 663-2792; e-mail DDTCResponseTeam@state.gov. ATTN: Regulatory Change, ITAR Section 123.17.

SUPPLEMENTARY INFORMATION: In August 2009, the Department of State amended the ITAR to provide an exemption for the temporary export of body armor covered by 22 CFR 121.1, Category X(a)(1). Now, the Department is amending the ITAR to add an exemption for the temporary export of chemical agent protective gear covered by 22 CFR 121.1, Category XIV(f)(4). The exemption is available for U.S. persons for temporary exports to countries not subject to restrictions under ITAR §126.1, and to countries subject to restrictions under ITAR §126.1 under specified conditions. In order to use the exemption, the chemical agent protective gear must be for the U.S. person's exclusive use and must be returned to the United States. The U.S. person may not reexport the protective gear to a foreign person or otherwise transfer ownership. The protective gear may not be exported to any country where the importation would be in violation of that country's laws.

New §123.17(j) specifies that if the chemical agent protective gear is not returned to the United States with the individual that temporarily exported the gear, a detailed report of the incident must be submitted to the Office of Defense Trade Controls Compliance in accordance with the requirements of ITAR §127.12(c)(2). If the chemical agent protective gear is lost or stolen, the report should describe all attempts to locate the gear and explain the circumstances leading to its loss or theft. In the event the chemical agent protective gear is used and disposed of according to HAZMAT guidelines, the report should provide a disposal date and location details for the approved HAZMAT facility used, along with a receipt for disposal services. If a HAZMAT facility is not available, the report should describe the date, location, and method used to dispose of the protective gear. In the proposed rule, this disclosure provision was covered in

paragraph (f) and applied only to the body armor and chemical agent protective gear provisions. In this final rule, we specify that, in addition to applying to the body armor and chemical agent protective gear exemptions, it also applies to the firearms exemption covered in paragraph (c).

The change removes the requirement that assistance to the government of Iraq be “humanitarian” to more accurately match the language of United Nations Security Council restrictions, which do not limit assistance to humanitarian assistance.

New §123.17(k) clarifies that individuals who are U.S. persons seeking to use the exemptions of §123.17 are not required to be registered with the Department of State (the registration requirement is described in ITAR part 122).

Section (c)(3) is revised to remove what is in practice extraneous language. Subject to the requirements of (c)(1) – (3), the exemption applies to all eligible individuals (with the noted exceptions). Thus, while the text is revised, the meaning of (c)(3) is not changed.

The authority citation for ITAR part 126 is corrected to include sections 7045 and 7046 of Public Law 112-74.

This rule was first published as a proposed rule on March 23, 2011, soliciting public comment. The comment period ended May 23, 2011. Seven parties filed comments recommending changes. The Department’s evaluation of the written comments and recommendations follows:

Three commenting parties requested the elimination of the requirement for a U.S. Customs and Border Protection (CBP) inspection before export, citing logistical difficulties in certain instances (for example, departing on a U.S. military airplane from a U.S. military base). According to law and regulations, persons who claim this exemption must submit the

articles for CBP inspection at departure, regardless of the type of aircraft used for departure from the United States. Therefore, the Department did not accept this recommendation.

Three commenting parties requested clarification of the phrase, “affiliated with the U.S. Government,” or recommended it be replaced with “travelling in support of a U.S. Government contract.” Because the first phrase includes those employed by the U.S. Government, and is meant to include those who are described by the second phrase, the Department has kept the first phrase and amended the regulation to include the second phrase.

Two commenting parties recommended the option of separate shipment or mailing of armor or gear exported using this exemption, stating that carrying the armor or gear is burdensome. We acknowledge that carrying the armor or gear may present certain logistical difficulties, but because this exemption is intentionally of limited scope, we are not prepared to authorize separate shipment or mailing as a mean of export at this time. Therefore, the Department did not accept this recommendation.

Two commenting parties inquired into what type of documentation may be used to satisfy the exemption requirements for Iraq. As the rule is written, various forms of documentation may be presented to fulfill the exemption requirements, including the examples proffered by the commenting parties (contract with or letter from the U.S. Government).

One commenting party recommended including specific mention of the C2 canister as covered by the chemical agent protective gear exemption. Upon reflection, the Department determined that the exemption would be more useful if it provided for coverage of a spare filter canister (of which the C2 canister is one variant). Therefore, the Department in effect accepted

this recommendation, although it opted for use of the more generic term of “filter canister” rather than “C2 canister.”

One commenting party recommended the removal of the requirement to submit a report to the Office of Defense Trade Controls Compliance in accordance with the requirements of §127.12(c)(2) should the person temporarily exporting under this exemption not be able to return the exported items. The commenting party said it would be “wrong” to treat as a violation an instance where the impediment to return was the actual intended use and destruction of the body armor or chemical agent protective gear. The Department notes when an item authorized only for temporary export is not returned to the United States, by definition it is a violation. Section 127.12(c)(2) is the means by which such a violation is reported to the Department. The Department did not accept this recommendation.

One commenting party recommended broadening this exemption for use by U.S. persons, as defined at ITAR §120.14. The Department clarifies that the exemption is for use by U.S. persons, as defined at ITAR §120.14.

One commenting party recommended the removal of the requirement to file the export declaration through the Automated Export System (AES), with the explanation that AES is not available for individual use. The Department verified that AES is available for individual use. Therefore, the Department did not accept this recommendation.

One commenting party recommended expanding the exemption to allow a U.S. person to export and distribute to employees the items covered by the exemption. While a company within the definition of “U.S. person” may claim the exemption for his employees, the individual employees must export the items and these items must be with the individual’s baggage or effects, whether accompanied or unaccompanied (but not mailed).

One commenting party recommended allowing the use of this exemption for temporary export to proscribed destinations listed in ITAR §126.1, when the person using the exemption is travelling on official business in support of a U.S. government contract. The Department agreed with the rationale that this modification to the proposed rule would “allow for the timely support of U.S. Government contracts in hazardous areas of foreign countries where such protective gear is required for personal safety.” Therefore, the Department accepted this recommendation.

One commenting party recommended eliminating the requirement in paragraph (f)(3) for the individual to declare to CBP his intention of returning the articles upon each return to the United States, stating that it is common practice for persons to safely store their gear overseas when returning home for short visits. The Department accepted this recommendation, and has revised paragraph (f)(3) to require the person to declare that it is his intention to return the articles “at the end of tour, contract, or assignment for which the articles were temporarily exported.”

One commenting party recommended providing the option of depositing the body armor or chemical agent protective gear with a U.S. Government depot and receiving a receipt in lieu of physical return of the articles to the United States, and another commenting party inquired whether this was permissible under the exemption. In order to avoid the requirement of obtaining a license from the Department for the export, the articles temporarily exported under this exemption must be physically returned to the United States. Therefore, the Department did not accept this recommendation.

One commenting party recommended including helmets in the body armor exemption, noting that helmets are frequently added to a suit of

armor, and that it “makes good sense” to include in the same exemption that covers items that protect a person’s body an item that protects a person’s head. The Department agreed with this recommendation, and has added helmets covered by 22 CFR 121.1, Category X(a)(6) to the exemption for the temporary export of body armor, when the helmet is included with the body armor. The exemption is not available for the helmet alone.

Having thoroughly reviewed and evaluated the comments and the recommended changes, the Department has determined that it will, and hereby does, adopt the proposed rule, with changes noted and other edits, and promulgates it as a final rule.

REGULATORY ANALYSIS AND NOTICES

Administrative Procedure Act

The Department of State is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United States Government and that rules implementing this function are exempt from §553 (Rulemaking) and §554 (Adjudications) of the Administrative Procedure Act. Although the Department is of the opinion that this rule is exempt from the rulemaking provisions of the APA, the Department published this rule with a 60-day provision for public comment and without prejudice to its determination that restricting defense article exports is a foreign affairs function.

Regulatory Flexibility Act

Since the Department is of the opinion that this rule is exempt from the rulemaking provisions of 5 U.S.C. 553, it does not require analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This amendment does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Executive Order 13175

The Department has determined that this rule will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not pre-empt tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this rule.

Small Business Regulatory Enforcement Fairness Act of 1996

This amendment has been found not to be a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996.

Executive Orders 12372 and 13132

This amendment will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this amendment does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this amendment.

Executive Order 12866

The Department is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United States Government and that rules governing the conduct of this function are exempt from the requirements of Executive Order 12866. However, the Department has reviewed the rule to ensure its consistency with the regulatory philosophy and principles set forth in the Executive Order.

Executive Order 13563

The Department of State has considered this rule in light of Executive Order 13563, dated January 18, 2011, and affirms that this regulation is consistent with the guidance therein.

Executive Order 12988

The Department of State has reviewed this amendment in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Paperwork Reduction Act

This rule does not impose any new reporting or recordkeeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

List of Subjects in 22 CFR Parts 123 and 126

Arms and munitions, Exports.

Accordingly, for the reasons set forth above, Title 22, Chapter I, Subchapter M, parts 123 and 126 are amended as follows:

**PART 123 – LICENSES FOR THE EXPORT OF DEFENSE
ARTICLES**

1. The authority citation for part 123 continues to read as follows:

Authority: Secs. 2, 38, and 71, Pub. L. 90-629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2753; E.O. 11958, 42 FR 4311; 3 CFR, 1977

Comp. p.79; 22 U.S.C. 2651a; 22 U.S.C. 2776; Pub. L. 105-261, 112 Stat. 1920; Sec. 1205(a), Pub. L. 107-228.

2. Section 123.17 is amended by revising the section heading, and paragraphs (c), (f), and (g), and adding paragraphs (h) through (k), to read as follows:

§123.17 Exports of firearms, ammunition, and personal protective gear.

* * * * *

(c) Port Directors of U.S. Customs and Border Protection (CBP) shall permit U.S. persons to export temporarily from the United States without a license not more than three nonautomatic firearms in Category I(a) of §121.1 of this subchapter and not more than 1,000 cartridges therefor, provided that:

(1) The person declares the articles to a CBP officer upon each departure from the United States, presents the Internal Transaction Number from submission of the Electronic Export Information in the Automated Export System per §123.22 of this subchapter, and the articles are presented to the CBP officer for inspection;

(2) The firearms and accompanying ammunition to be exported is with the individual's baggage or effects, whether accompanied or unaccompanied (but not mailed); and

(3) The firearms and accompanying ammunition must be for that person's exclusive use and not for reexport or other transfer of ownership. The person must declare that it is his intention to return the article(s) on each return to the United States. The foregoing exemption is not applicable to the personnel referred to in §123.18 of this subchapter.

* * * * *

(f) Port Directors of U.S. Customs and Border Protection (CBP) shall permit U.S. persons to export temporarily from the United States without a license

one set of body armor covered by U.S. Munitions List Category X(a)(1), which may include one helmet covered by U.S. Munitions List Category X(a)(6), or one set of chemical agent protective gear covered by U.S. Munitions List Category XIV(f)(4), which may include one additional filter canister, provided:

(1) The person declares the articles to a CBP officer upon each departure from the United States, presents the Internal Transaction Number from submission of the Electronic Export Information in the Automated Export System (AES) per §123.22 of this subchapter, and the articles are presented to the CBP officer for inspection;

(2) The body armor, which may include a helmet, or chemical agent protective gear, which may include one additional filter canister, to be exported is with the individual's baggage or effects, whether accompanied or unaccompanied (but not mailed); and

(3) The body armor, which may include a helmet, or chemical agent protective gear, which may include one additional filter canister, to be exported is for that person's exclusive use and not for reexport or other transfer of ownership. The person must declare it is his intention to return the article(s) to the United States at the end of tour, contract, or assignment for which the articles were temporarily exported.

(g) The license exemption set forth in paragraph (f) of this section is available for the temporary export of body armor or chemical agent protective gear for personal use to countries listed in §126.1 of this subchapter provided:

(1) The conditions in paragraph (f) of this section are met; and

(2) The person is affiliated with the U.S. Government traveling on official business or is traveling in support of a U.S. Government contract. The

person shall present documentation to this effect, along with the Internal Transaction Number for the AES submission, to the CBP officer.

(h) The license exemption set forth in paragraph (f) of this section is available for the temporary export of body armor, which may include a helmet, or chemical agent protective gear, which may include one additional filter canister, for personal use to Iraq, provided the conditions in paragraph (f) are met, and the person is either affiliated with the U.S. Government traveling on official business or is traveling in support of a U.S. Government contract, or is traveling to Iraq under a direct authorization by the Government of Iraq and engaging in activities for, on behalf of, or at the request of, the Government of Iraq. The person shall present documentation to this effect, along with the Internal Transaction Number for the AES submission, to the CBP officer. Documentation regarding direct authorization from the Government of Iraq shall include an English translation.

(i) The license exemption set forth in paragraph (f) of this section is available for the temporary export of body armor, which may include a helmet, or chemical agent protective gear, which may include one additional filter canister, for personal use to Afghanistan, provided the conditions in paragraph (f) are met.

(j) If the articles temporarily exported pursuant to paragraphs (c) and (f) through (i) of this section are not returned to the United States, a detailed report must be submitted to the Office of Defense Trade Controls Compliance in accordance with the requirements of §127.12(c)(2) of this subchapter.

(k) To use the exemptions in this section, individuals are not required to be registered with the Department of State (the registration requirement is

described in part 122 of this subchapter). All other entities must be registered and eligible, as provided in §§120.1(c) and (d) and part 122 of this subchapter.

PART 126 – GENERAL POLICIES AND PROVISIONS

3. The authority citation for part 126 is revised to read as follows:

Authority: Secs. 2, 38, 40, 42, and 71, Pub. L. 90-629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2780, 2791, and 2797); E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp., p.79; 22 U.S.C. 2651a; 22 U.S.C. 287c; E.O. 12918, 59 FR 28205; 3 CFR, 1994 Comp., p.899; Sec. 1225, Pub. L. 108-375; Sec. 7089, Pub. L. 111-117; Pub. L. 111-266; Section 7045, Pub. L. 112-74; Section 7046, Pub. L. 112-74.

April 25, 2012

(Date)

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